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No. 03-1027

IN THE

Supreme Court of the United States

DONALD RUMSFELD, Secretary of Defense,
Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN,
As next friend of Jose Padilla,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENTS REGARDING CHOICE OF FORUM AND PROPER HABEAS RESPONDENT ISSUES

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QUESTIONS PRESENTED

1. Should this Court redefine "jurisdiction" in 28 U.S.C. § 2241(a) to mean "territorial boundaries" when nothing in the legislative history suggests that Congress intended to alter the plain meaning of the term—the power of a court to hear a case—and when, in habeas as in civil litigation generally, the reach of this power has expanded as Due Process limits on service of process have continued to evolve?

2. Should this Court create a "single-respondent-immediate-physical-custodian" rule given that this construct is conceptually incoherent, lacks statutory foundation, relies on an obsolete notion of "custody," and is inconsistent with the modern focus on procedural practicalities and functional pleading?

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Public Defender Service for the District of Columbia (PDS) is a federally funded agency that represents indigent criminal defendants in the District of Columbia (D.C.).[1] The vast majority of D.C. Code offenders are incarcerated outside of D.C., and choice of forum questions like the ones presented in this case regularly arise when a prisoner

[1] Accompanying this brief are letters of consent to its filing. No counsel for a party authored this brief in whole or in part, and no person, other than *Amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

held pursuant to a D.C. conviction seeks to invoke the jurisdiction of the D.C. courts under 28 U.S.C. § 2241. If this Court adopts the government's sweeping "jurisdictional" and proper party proposals, D.C. prisoners will be forced to bring their D.C.-related habeas claims in, for example, Ohio, South Carolina, or Massachusetts—any forum *other than* the one whose bench and bar are uniquely equipped to handle the litigation. PDS has a strong interest in preserving its ability to represent its clients in habeas proceedings in local courts.

In addition, it may be helpful for the Court in this case to examine the history of habeas forum litigation in D.C.—a cautionary tale in the use of misguided and profitless habeas choice of forum rules of the sort espoused by the government. Such rules were applied in D.C. under the regime of *Ahrens v. Clark*, 335 U.S. 188 (1948), but were largely discarded when that decision was overruled. Even though D.C. demonstrated that venue rules are an efficient means of assessing choice of forum in habeas, the government has recently revived a debate over "jurisdictional" limits with its effort to use *Ahrens*-type rules to bar D.C. prisoners with D.C.-related claims from D.C. courts.

INTRODUCTION

The government asks this Court to frustrate the fair and efficient administration of habeas cases by compelling district judges who are assessing a petitioner's choice of forum to give talismanic significance to two factors, the petitioner's location and the identity of his "immediate physical custodian." The former is relevant but not always dispositive when assessing choice of forum; the latter is impossible to define coherently and is completely beside the point. It would be hard to countenance such an illogical forum selection analysis even if the habeas statutes unambiguously compelled it. But the language, history, and purpose of the habeas statues, as well as this Courts' precedents, do not permit the government's jurisdictional and pleading proposals, much less

require them. The lower courts thus correctly rejected the government's arguments and properly conducted the type of thoughtful choice-of-forum analysis that Congress and this Court have commanded in habeas as in every other civil litigation context.

ARGUMENT

I. THE GOVERNMENT'S INVITATION TO IMPOSE STRICT TERRITORIAL LIMITS ON HABEAS JURISDICTION AND TO CREATE A "SINGLE-RESPONDENT-IMMEDIATE-PHYSICAL-CUSTODIAN" RULE SHOULD BE REJECTED.

A. Nothing In The Legislative History Suggests That Congress Intended To Redefine "Jurisdiction" In 28 U.S.C. § 2241(a) To Mean "Territorial Boundaries"; Jurisdiction Has A Plain Meaning—The Power Of A Court To Hear A Case—And, In Habeas As In Civil Litigation Generally, The Reach Of This Power Has Expanded As Due Process Limits on Service of Process Have Continued To Evolve.

The government's primary argument is that a federal court does not act "within its respective jurisdiction" under 28 U.S.C. § 2241(a) when it exercises power over a federal government agent acting in his official capacity, unless that official is personally, physically present within the territorial boundaries of the court's district. This argument, of course, is a plea to return to the interpretation of "jurisdiction" that was mistakenly espoused in *Ahrens v. Clark*, 335 U.S. 188 (1948)—namely, an interpretation that confused the concept of jurisdiction with the sort of territorial due process limitations on service of process endorsed in *Pennoyer v. Neff*, 95 U.S. 714 (1877). It is no wonder that the lower courts gave the government's jurisdictional argument "short shrift," Gov't Br. at 22; it has no support in the statutory

language, legislative history, this Court's current precedent, or common sense.

On its face, § 2241 does not support the government's argument that the notion of "jurisdiction" is territorially limited in the habeas context. The statute says nothing about territory or geography; nor does the statutory phrase "within their respective jurisdictions" contain any implicit territorial aspect, as it applies equally to this Court and the Courts of Appeals, all of which have always exercised "jurisdiction" far beyond state borders. The plain meaning of "jurisdiction" was in 1867, as it is today, "the power [of a court] to hear and determine" a matter in controversy. *Riggs v. Johnson*, 73 U.S. 166, 187 (1867); Black's Law Dictionary (6th ed. 1990). At the time the habeas statute was drafted, it was well-settled that a court's power over a defendant, i.e, its personal jurisdiction, was essentially a function of its ability to "serv[e] process." *Cooper v. Reynolds*, 77 U.S. 308, 316 (1870). That was exactly how the courts below read the statute, equating their "jurisdiction" under § 2241 as being coextensive with their ability to serve process on an out-of-state respondent.

Without even acknowledging the extraordinary manner in which it proposes to redefine "jurisdiction," the government argues that its territorially-restricted construction of the term is compelled by Congress's "purpose in adding . . . [the] language ['within their respective jurisdictions']" in 1867, which "was precisely to foreclose a district court from issuing process beyond the district court's territorial borders." Gov't Br. at 23. But, as the government itself acknowledges, Congress' only object was to ensure that federal courts' power *tracked the limits of their ability to serve process*, which in an era when lines of communication were fractured and slow and travel difficult, was generally limited to territorial borders out of fairness concerns. There is simply nothing in the legislative history that can fairly be read to suggest that Congress's "purpose" in adding that term was to

create the sort of territorial "jurisdiction," unique to habeas, that the government suggests, or to freeze this construct of habeas "jurisdiction" even as service of process restrictions continued to evolve and the "power and authority" of the federal courts expanded in all other areas of the law. *See Ahrens*, 335 U.S. at 206 (Rutledge, J., dissenting).

Certainly, if Congress wanted to impose for all time strict territorial limits on the habeas jurisdiction of federal courts, it would not have chosen the word "jurisdiction," which has never had a single, precisely defined or immutable signification in legal parlance. *See Costello v. United States*, 365 U.S. 265, 287 (1961) ("Among the terms of art in the law, 'jurisdiction' can hardly be said to have a fixed content."). By borrowing a term of art "in which [is] accumulated the legal tradition and meaning of centuries of practice, [Congress] presumably kn[e]w[] and adopt[ed] the cluster of ideas that were attached." *Molzof v. United States*, 502 U.S. 301, 307 (1992). In fact, the legislative history documents that Congress was well aware of the mutability of federal courts' "jurisdiction," and nonetheless declined to give this term one fixed meaning, much less the static, territorially-limited definition proffered by the government.[2]

To the extent that Congress had a deeper motive for adding the phrase "within their respective jurisdictions," it was not to

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[2] *See* Cong. Globe 39th Cong., 2d Sess. 899 (1867) (House of Representatives' discussion regarding the Senate's amendment adding the "within their respective jurisdictions" language):

> "MR. COOK. I move that the House concur in the amendment.
>
> "MR. WRIGHT. I would ask whether anybody in this House, when he gives his vote on these amendments, knows what he is voting upon? [Laughter].
>
> "The SPEAKER. The gentleman from New Jersey is not in order. The question is on the motion to concur.
>
> "The motion was agreed to."

restrict the power of habeas courts, but to "enlarge the privilege of the writ of h[a]beas corpus, and make the jurisdiction of the courts and judges of the United States *coextensive* with all the powers that can be conferred upon them." William F. Duker, *A Constitutional History of Habeas Corpus*, 189-90 (1980) (quoting Representative Lawrence, author of the Bill in the House) (emphasis added). It is critical to remember that the "respective jurisdictions" phrase now codified in 28 U.S.C. § 2241(a) was added to the law of federal habeas corpus—as the government acknowledges with no apparent understanding of the significance of the fact—when the national courts' habeas jurisdiction was expanded beyond federal prisoners (who already had access to the writ under § 14 of the Judiciary Act of 1789) to state prisoners. *See* Act of February 5, 1867, chapter 28, § 1. This post Civil-War era measure provided federal courts with the "power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States." *Id.* In passing this statute, Congress made clear that its aim was not to constrict any pre-existing authority to issue the writ but rather to grant new power "in addition to the authority already conferred by law." *Id.*; *see also Ahrens*, 335 U.S. at 206 n. 23 (Rutledge, J., dissenting). Examined in this context, the "within their respective jurisdictions" language ensured only that a habeas court would not have *broader* authority to act when issuing a writ of habeas corpus than it did when acting in any other civil case. *See Ahrens,* 335 U.S. at 204-205 (Rutledge, J., dissenting).

It is true, of course, that this Court's now-overruled decision in *Ahrens* originally read the term "jurisdiction" in the idiosyncratic way the government does here. But, as Justice Rutledge explained in his comprehensive dissent, this "formulation of rigid territorial limitations," 335 U.S. at 199, was a mistake at the time. The majority's decision permitted

"jailers [to] stand in defiance of federal judicial power, and plead either the accident of the locus of detention outside the court's territorial limitations, or their own astuteness in so selecting the place, to nullify judicial competence." *Id.* at 195. This curtailment of the power of habeas courts was, in Justice Rutledge's view, completely contrary to the language and history of the statute; it also defied the modern understanding of the term under which a lower court has jurisdiction whenever "process [could be] lawfully issued and served upon" the named respondent. *Id.* at 199-200.

Ahrens' misguided rule, confusing the term "jurisdiction" in habeas with obsolete, nineteenth-century limitations on service of process, quickly proved unworkable in the modern era, and Congress moved to undo it. With the passage of 28 U.S.C. § 2255 (in 1948) and 28 U.S.C. § 2241(d) (in 1966), Congress made sure that a "more convenient forum" namely, the court of conviction, was available to a large group of petitioners, and thereby alleviated the pressure on courts in districts housing correctional facilities. *United States v. Hayman*, 342 U.S. 205, 219 (1952); *see also Braden v. 30th Judicial Circuit*, 410 U.S. 484, 497 (1973). The government curiously argues that passage of these two statutes "would have been unnecessary if the court of appeals' understanding of habeas jurisdiction were correct," Gov't Br. at 24, but the government ignores the fact that these statutes were passed precisely because the inefficient and ill-advised rule of *Ahrens*—the rule the government seeks to reinstate—was still the law of the land at the time.

With its decisions in *Carbo v. United States*, 364 U.S. 611 (1961) and *Strait v. Laird*, 406 U.S. 341 (1972), this Court also distanced itself from the impracticable rule of *Ahrens* and signaled that habeas jurisdiction would soon be realigned

with civil jurisdiction generally.[3] In *Carbo*, the Court carved out an exception to the restrictive *Ahrens* rule for writs of *habeas corpus ad prosequendum* (a writ directing the production of a defendant or witness for trial, authorized by 28 U.S.C. § 2241(c)(5)), because nationwide use of these writs was deemed necessary "for jurisdictional potency as well as administrative efficiency." 364 U.S. at 618. Then, in *Strait*, the Court held that an army reservist could file a habeas petition in California naming his commanding officer in Indiana as the respondent. After concluding that the reservist's commanding officer was "present" in California through the chain of command, the Court in *Strait* explained that it was "well-settled" that "such [constructive] 'presence' may suffice for personal jurisdiction." 406 U.S. at 345 n.2 (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)). The Court further noted that this "concept is . . . not a novel one as regards habeas corpus jurisdiction. In *Ex Parte Endo* . . . we said that habeas corpus may issue 'if a respondent who has custody of the prisoner is within the reach of the court's process.'" *Id.* (quoting *Ex Pare Endo,* 323 U.S. 283, 307 (1944)).

Finally, in *Braden*, this Court expressly rejected its decision in *Ahrens* in its entirety, and brought jurisdiction analysis in habeas back into alignment with jurisdiction analysis elsewhere in the civil arena. Carefully reviewing the statutory language, the Court concluded, as had Justice Rutledge twenty-five years earlier, that its territorial interpretation of "within their respective jurisdictions" was unfounded. 410 U.S. at 495. The Court also observed that "Congress has indicated that a number of the premises which were thought to require th[e *Ahrens*] decision are untenable." *Id.* at 497. The Court specifically noted that its decision in *Ahrens* "rested on the view that Congress' paramount concern" was the expense and risk of transporting prisoners to different districts. *Id.* at 496. But the Court acknowledged that, with the passage of § 2255 and § 2241(d), "Congress explicitly recognized the substantial advantages of having these cases resolved in the court which originally imposed the confinement or in the court located nearest the site of the underlying controversy." *Id.* at 497. Based on these considerations, this Court rejected the rule of *Ahrens* once and for all and held that:

> [s]o long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Braden, 410 U.S. at 495. Since *Braden*, this Court has given no indication that its total rejection of *Ahrens* was misconceived; nor has Congress in any way signaled that it disapproved of this Court's mainstreaming of habeas jurisdiction principles.

The government barely acknowledges this habeas history.[4] To the extent that the government does address *Braden* and *Strait*, it dismisses these cases on indefensible grounds. With the assistance of selective citation, *see* Gov't Br. at 25 (citing to 410 U.S. at 495 and at 500), the government incorrectly

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[3] Even earlier, in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), this Court entirely ignored *Ahrens* and never intimated that there was any question about a federal district court's jurisdiction to consider the habeas petition of an ex-serviceman who had been removed to Korea to face court-martial proceedings.

[4] On the issue of jurisdiction, the government affirmatively cites to one pre-*Braden* case, *Schlanger v. Seamans*, 401 U.S. 487 (1971), but the government nowhere acknowledges that this Court clarified in *Strait* that "the jurisdictional defect in *Schlanger* was not merely the [respondent's] physical absence" from the district, "*but the total lack of formal contacts* between *Schlanger*" and the district. 406 U.S. at 344 (emphasis added).

asserts that *Braden* merely reaffirmed that service of process within a territorial district is proper, and that *Braden* is distinguishable because it is a detainer case. *See* Gov't Br. at 20, 26. But if this Court's holding in *Braden* had, in fact, been so limited, this Court could have easily distinguished *Braden* from *Ahrens* and would not have repudiated *Ahrens* in its entirety. Instead, the Court carefully explained that the "inflexible jurisdictional rule" based on territorial boundaries set forth in *Ahrens* could no longer apply under any circumstance, and that it was therefore endorsing the use of "traditional principles of venue" to determine the proper choice of forum in habeas cases. *Braden*, 410 U.S. at 500.

Likewise, the government fails in its attempt to distinguish *Strait* on the grounds that it (1) only applies to a limited class of cases—either those where the petitioner is nominally in custody or where the petitioner is an unattached reservist (the exact boundaries of this supposed limitation are unclear), and (2) only expands jurisdiction to reach the place where the "effects of custody in fact were felt" by the petitioner. Gov't Br. at 26. Nothing in *Strait* supports the government's convoluted interpretation of the Court's holding, which is also irreconcilable with *Strait's* reliance on *Ex Parte Endo* (*see* p. 8, *supra*). In any event, it is completely illogical to argue that habeas petitioners who are physically detained should be subject to more strict "jurisdictional" rules than petitioners who are only nominally in custody.

Just as remarkable as its disregard for the relevant precedent and the history of habeas law generally, is the government's failure to explain why this Court should regress to a mistaken interpretation of "jurisdiction" that thwarted Congressional intent and was ultimately rejected because it was incompatible with modern law and modern realities.[5] No

[5] The only remotely relevant concern raised by the government is that, without territorial limits, more than one district court might have habeas jurisdiction, Gov't Br. at 23, but this is commonplace in the civil context, and, as this Court noted in *Braden*, 410 U.S. at 499 n.15, is easily resolved with the application of venue principles, *see* Section IV *infra*.

rational basis for the government's proposal exists, given: (1) the manner in which modern transportation and communication have greatly reduced the burdens of all inter-jurisdictional litigation; (2) the reality that all government officials sued in their official capacities have at their disposal a phalanx of local Department of Justice (DOJ) attorneys to defend them in any judicial district in the country; and (3) the absurdity of any assertion that it would be burdensome for the United States, the real party in interest, to be required to defend its actions in any Article III court.

In sum, the government's proposal to construe the statutory term "jurisdiction," in § 2241 cases alone, as restricting the exercise of a district court's authority to its territorial boundaries, has no basis in law or logic.

B. The Government's "Single-Respondent-Immediate-Physical-Custodian" Proposal Is A Conceptually Incoherent Construct That Has No Statutory Foundation, Relies On An Obsolete Notion of "Custody," And Is Inconsistent With The Modern Focus On Procedural Practicalities And Functional Pleading.

Just as the government seeks to read the word "territorial" into § 2241's discussion of "respective jurisdictions," it insists on adding the words "immediate" and "physical" to the provisions that deal with naming a respondent. Once again, this effort to graft requirements onto the habeas statutes bears no relationship to their actual language, this Court's precedents, or modern rules of civil procedure. Equally problematic, the government's rule is conceptually incoherent and will often lead to a fruitless search for an imaginary, single "custodian," when the real party in interest

is the United States government, who will always be represented by a local branch of DOJ.

Although the government tries to sell its "immediate physical custodian" proposal as a simple rule that is easily applied, the concept of "immediate physical custodian" does not withstand close scrutiny and will only cause judicial headaches if adopted by this Court. *See, e.g., Roman v. Ashcroft*, 340 F.3d 314, 320, 323 (6th Cir. 2003) (holding, inconsistently, that the Attorney General cannot be named as respondent because he does not have "actual physical custody" of petitioners, but that the "immediate physical custodian" is the Immigration and Naturalization Service (INS) District Director, not the warden of the detention facility); *see also Eisel v. Secretary of the Army*, 477 F.2d 1251, 1258 (D.C. Cir. 1973) (questioning whether it is possible to "grant substance to the vague concept of 'immediate custodianship'"); Megan A. Ferstenfeld-Torres, *Who Are We to Name? The Applicability of the "Immediate-Custodian-As-Respondent" Rule to Habeas Claims under 28 U.S.C. § 2241*, 17 Geo. Immigr. L. J. 431, 460-68 (Spring 2003) (explaining why the concept of an "immediate custodian" is a "hopeless anachronism").

The government itself provides three distinct definitions for the fictitious entity it labels the "immediate physical custodian": (1) the person "with day to day physical control over the detainee"; (2) the person "best situated to produce . . . the body of the person detained if necessary"; and (3) "the warden or Commanding Officer of the facility" in which the petitioner is physically confined. Gov't Br. at 17, 19. But given the modern reality of government bureaucracy, this description captures, *at least*, three different people. In the case of a § 2241 petitioner housed in a federal prison facility, the Bureau of Prisons (BOP) employees with "day to day physical control" will not be the same people who would be responsible for bringing the petitioner to court (who would presumably be agents of the United States Marshals Service,

see 18 U.S.C. § 3621(d)), and the BOP warden is yet another person entirely.[6] Although Mr. Padilla is in a naval brig, not in a BOP facility, it seems highly unlikely that the United States Navy requires Commander Marr, who the government identifies as Mr. Padilla's "immediate physical custodian," Gov't Br. At 21 to wear the three hats of jailer, transporter, and warden.

More importantly, the relevant entity in the federal bureaucracy for habeas purposes is not *the* person who can "produce the body" in court or who has "day to day control" over the petitioner, on either an immediate or supervisory level, but *any* person with the legal authority to ensure release. The government admits that even the imaginary solitary entity it dubs the "immediate physical custodian" would not have this power, *see* Gov't Br. at 19 ("*no* prison warden or facility commander has independent authority to determine the duration of a detainee's confinement"), and, in so doing, concedes that the act of naming the "single-respondent-immediate-physical-custodian" is an empty formalism. *See Eisel*, 477 F.2d at 1262 (where "true 'jailer' is that faceless amalgam of decision-making process known as the 'bureaucracy,'" it is senseless to "trace through the baroque interior of the petitioners' cases" to identify one "particular decision-maker as their custodian").

Meaningless formalism though it is, the government incorrectly asserts, as it does in its jurisdictional argument, that its "single-respondent-immediate-physical-custodian" rule is "dictated" by statutes—in this instance 28 U.S.C. §§ 2242 & 2243. *See* Gov't Br. at 17, 19. First, none of the

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[6] The matter is complicated still further when a facility is being paid to house the petitioner, and the administrator of the facility has no legal control over the fact or duration of confinement. In such cases, some courts have held that the "immediate-custodian" label encompasses a legal "custodian." *See, e.g., Roman*, 340 F.3d at 320 ("immediate physical custodian" is the INS District Director).

words—"immediate," "physical" or "custodian"—appear anywhere in the statutes cited by the government. Rather, § 2242 requires that the petitioner "allege . . . the name of the person who has custody over him and by virtue of what claim or authority, if known"; and § 2243 provides that the writ of habeas corpus "shall be directed to the person having custody of the person detained." Second, as this Court has explained, the habeas statutes do not even define the term of art "custody," *see Jones v. Cunningham*, 371 U.S. 236, 238 (1963) ("the statute does not attempt to mark the boundaries of custody"); *cf. Peyton v. Rowe*, 391 U.S. 54, 64 (1968) (meaning of "custody" under § 2241 "is not free of ambiguity"); *see also* Duker, *supra*, at 288 (the meaning of "custody," has been wholly a product of "judicial determination"). Nor do the statutes specify the identity of any "person" having custody, much less give any indication that the only proper respondent is the "immediate physical custodian." Third, any minimum requirement that a habeas petitioner name "the person" with "custody" over him "if known," 28 U.S.C. § 2242, is a far cry from creating a requirement that the petitioner name *only* that "person," even if the term "person" could permissibly be limited to the singular. Such a statutory interpretation is foreclosed, however, by 1 U.S.C. § 1, which expressly provides that "words importing the singular include and apply to several persons, parties or things."

Not only is the government's "single-respondent-immediate-custodian" rule devoid of statutory support, it also has no support in this Court's modern precedents which have, instead, read the habeas statutes to incorporate a functional concept of "custody" based on legal restraint whereby the "custodian" is defined as *anyone* with the power to set the petitioner free. *See* pp. 16-19 *infra*. Ignoring these developments in the law, the government reaches back to *Wales v. Whitney*, 114 U.S. 564 (1885), to provide both the mandate for its "single-respondent-immediate-physical-custodian" proposal and the definitive interpretation of "custody."

Gov't Br. at 17. With respect to the former, the government's reliance on *Wales* is misplaced; *Wales* contains no discussion of, and has nothing do with, rules for naming the proper respondent.[7] Indeed, in *Wales*, the Court made no comment about the fact that the Secretary of the Navy was named as respondent; instead, it questioned whether Wales, who was awaiting a court martial and had been directed to remain in the city limits of the District of Columbia, was in *anyone*'s custody. The term "immediate" was used in the context of a discussion about whether Wales faced a present—as opposed to an anticipated—physical restraint. Because the Court found that Wales had not yet been subject to any "physical restraint," it held that he could not seek habeas relief. 114 U.S. at 569. Thus, in essence, *Wales* was about the ripeness of a habeas petition.

The government's effort to rely on *Wales* as this Court's last word on the meaning of "custody" likewise fails. In this respect *Wales* was expressly overruled by *Hensley v. Municipal Court, San Jose-Milpitas Judicial District*, 411 U.S. 345, 350 n.8 (1973), and *Hensley* is but one of a myriad of twentieth-century habeas cases (to which the government pays little heed) in which this Court has deliberately moved away from a formalistic interpretation of "custody" toward a functional approach directed at whether the petitioner is subject to any legal restrictions which the named respondent is capable of eliminating. *See, e.g., Garlotte v. Fordice*, 515 U.S. 39, 42 (1995) (petitioner serving consecutive state

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[7] No other, more recent decision from this Court provides the government with a foundation for its pleading proposal. Even in *Ahrens*, arguably the high-water mark of this Court's adherence to mechanistic procedures in habeas, this Court did not hold that there was only one proper respondent to a habeas petition, and said nothing about any requirement that the petitioners name their "immediate physical custodian." 355 U.S. at 198-99 (Rutledge, J., dissenting).

sentences is "in custody" for the purpose of challenging sentence, now expired, which ran first); *Carafas v. LaVallee*, 391 U.S. 234 (1968) (petitioner whose sentence had expired was "in custody" because of adverse consequences that continued to flow from the fact of his conviction); *Jones*, 371 U.S. at 243 (paroled prisoner was "in custody" and parole board was a proper respondent); *see generally*, Duker, *supra*, at 287-296.

In the course of its reinterpretation of the term "custody," this Court has also made clear that the "concept[] of [a] custodian" is "sufficiently broad" to allow persons in a chain of command to be named as habeas respondents and to account for the practical realities of the case. *Strait*, 406 U.S. at 345-46. In other words, just as this Court has shifted to an interpretation of "custody" equated with legal restraint, it has shifted to an understanding of "person having custody" as someone with the legal authority to order the petitioner's release. Thus, in *Quarles*, for example, this Court did not question the exercise of habeas jurisdiction in a case brought by a serviceman who was challenging his detention in Korea but who named as respondent the Secretary of the Air Force, not his immediate "on-site" jailer or the local military commander. 350 U.S. 11.

Nowhere is this Court's focus on practicalities (and its disinterest in the type of formulaic pleading rule the government proposes) more apparent than in *Ex Parte Endo*. Dismissing the fact that no individual respondent had ever appeared in the proceedings in the lower courts, this Court in *Endo* indicated that it was satisfied that the federal government—which had been represented in the district court by the local United States Attorney's Office, and in the Supreme Court by the Solicitor General's Office—had

opposed the petition.[8] 323 U.S. at 307. Moreover, by accepting the government's representation that "the Secretary of the Interior or any official of the War Relocation Authority" would comply with the Court's order, this Court (and the government itself) acknowledged that there was no inherent significance in naming the turnkey as the respondent to the petition; the salient question was whether someone with the legal authority to release the petitioner was before the Court. *Id.* at 304-05.

Undoubtedly, the government will try to argue that each of these cases is an exception. If so, a more precise articulation of its proposed rule must be that a petitioner is required to name his "immediate physical custodian" (whatever that means) *unless* the petitioner is not "in physical custody"; or is outside the territory of the United States; or has been transferred after filing. This already unwieldy amalgam of exceptions begins to swallow the rule, however, when one looks beyond *Strait*, *Quarles*, and *Endo* and notes the number of cases where this Court has paid no attention whatsoever to the fact that the respondent was clearly not a person who could be characterized as an "immediate physical custodian."[9]

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[8] Indeed, no party in *Endo* had ever been served with process. 323 U.S. 307. Thus, *Endo* exemplifies that, in habeas as in the civil arena, jurisdiction is the court's power to hear the case, *see* p. 4 *supra*, and, although this power generally runs along the lines of service of process, even that is not always the case.

[9] *See, e.g.*, *Garlotte v. Fordice*, 515 U.S. 39 (1995) (naming Governor of Mississippi); *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995) (naming California Department of Corrections); *Wainwright v. Greenfield*, 474 U.S. 284 (1986) (naming Secretary of Florida Department of Corrections); *Middendorf v. Henry*, 425 U.S. 25 (1976) (naming Secretary of the Navy); *Braden*, 410 U.S. 484 (naming 30th Judicial Circuit of Kentucky); *Schlanger v. Seamans*, 401 U.S. 487 (1971) (naming Secretary of the Air Force); *Parisi v. Davidson*, 396 U.S. 1233 (1969) (naming Secretary of the Army); *Burns v. Wilson*, 346 U.S. 137 (1953) (naming Secretary of Defense).

Furthermore, the existence all of these "exceptional" cases proves that there is no talismanic quality to naming an "immediate physical custodian."

Given that the government's nonsensical pleading proposal has no support in the habeas statues or this Court's recent precedent, the burden is on the government to explain why such a rule is now necessary or desirable. The government is silent on this point, presumably because there is no rational explanation for such a rigid rule in this day and age. After all, a modern § 2241 petition is, in reality, not a suit against any individual named respondent, but a suit against the United States. *Cf. Cheney v. United States District Court for the District of Columbia*, 124 S.Ct. 1391, 1395 (2004) (Scalia, J. in Chambers). The respondent is named in his or her official capacity; does not appear in court or hire private counsel; and is represented by the local United States Attorney's Office and ultimately by DOJ. Indeed, DOJ is put on notice of every suit against a government official. *See* Fed. R. Civ. P. 4(i). In this context, it is absurd to require courts to expend their precious time to determine if the petitioner has named the single, "correct," "immediate physical custodian." Likewise, it is senseless and unjust to deny or delay habeas relief on a potentially meritorious claim simply because the petitioner has named the "wrong" federal government respondent.

In short, the government's effort to impose a "single-respondent-immediate-physical-custodian" pleading rule in habeas cases has no foundation in the statutory language, this Court's precedents, or modern practical realities. To the contrary,

> [t]he same principle which forbids formulation of rigid jurisdictional limitations upon the use of this prerogative writ in other respects . . . forbids limiting those who may be called upon to answer for restraints they unlawfully impose by technical niceties of the law of principal and agent, superior or subordinate in public authority, or immediacy or remoteness of the incidence of the authority or power to restrain.

Ahrens, 335 U.S. at 199 (Rutledge, J., dissenting).

II. THIS COURT LONG AGO ABANDONED, IN BOTH HABEAS AND CIVIL LITIGATION GENERALLY, THE SORT OF MECHANISTIC PROCEDURAL RULES PROFFERED BY THE GOVERNMENT.

The government's mechanistic proposals not only lack support in the habeas statutes but also are completely out of step with the past century of developments in civil and habeas law. In habeas, as in the civil world generally, the Court and Congress jointly have dispensed with strict territorial limits on service of process and formulaic pleading requirements, procedures that may once have been founded in legitimate policy considerations but have no relevance today. The government's proposals completely ignore these developments and fail to confront the controlling precedents from this Court that are of a piece with this overwhelming modernizing trend.

A. Modern Reforms In Civil Procedure Have Minimized The Importance Of Geographic Boundaries And Liberalized Pleading Rules.

Modernization in the civil arena is best captured by the Federal Rules of Civil Procedure, which were promulgated by this Court and Congress to promote fairness and efficiency by "get[ting] away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court." *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966); *see also* Fed. R. Civ. P. 1. Volumes have been written about the reforms assembled in the Federal Rules, but of particular interest in this case are the reforms that loosed the power of

the courts from territorial boundaries and refocused pleading rules (especially in the context of suing the government) on identifying the real party in interest.

Reforms in service of process expanded courts' power beyond geographic borders. Long ago, a court had to have physical control over the defendant both to initiate a lawsuit and to issue a judgment.[10] In the horse-and-buggy era, territorial boundaries were a brightline estimate of the limits of a court's ability to exercise power efficiently and fairly; with the advent of the automobile and telephone, however, these territorial restrictions became arbitrary limitations. Rule 4 of the Federal Rules of Civil Procedure and other similar state rules and long-arm statutes gradually lifted previous restrictions on service of process to reflect this new reality.[11] Such changes paved the way for this Court in *International Shoe,* 326 U.S. at 317, 320, to hold, once and for all, that whether process could be fairly served would no longer be assessed indirectly by relying on territorial touchstones, but directly by analyzing "minimum contacts" with the forum district.

Just as the Federal Rules freed service of process from territorial limits, they also liberalized pleading rules regarding naming defendants, "eliminat[ing] formalistic labels," Wright

[10] For example, the writ of *capias ad respondendum*—which commanded the sheriff to arrest the civil defendant and produce him in court so that he was present to answer to the complaint—was once used to initiate a civil action at common law. *See Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999); 9 W.C. Holdsworth, *A History of English Law*, 250-51, 254 (1944).

[11] *See, e.g.*, Fed. R. Civ. P. 4(i) (formerly Rule 4(d)(4) and (5)) (facilitating service on the federal government and its "Agencies, Corporations, Officers or Employees"); Fed. R. Civ. P. 4(k)(1) (formerly Rule 4(f)) (setting forth circumstances under which "[s]ervice of a summons . . . is effective to establish jurisdiction over the person of a defendant").

& Miller, *Federal Practice and Procedure* § 1601, at 6 (3d ed. 2001) (discussing Rule 19), and thereby ensuring that the real parties in interest were before the court. Provisions in two Rules—15(c)(3) and 25(d)—particularly facilitate proceeding against the government. Both rules are "responsive to the real[i]ty," *see* Fed. R. Civ. P. 15, Advisory Committee Notes, 1966 Amendments, that a suit against a federal government agency or official is ultimately a suit against the federal government itself. *See Cheney*, 124 S.Ct. at 1395; *see also Al-Marri v. Rumsfeld,* 360 F.3d 707, 709 (7th Cir. 2004) ("An official capacity suit such as this is against the office not the person"). Moreover, these two rules implicitly acknowledge the modern-day reality that our federal government is a highly-functioning bureaucracy with centralized lines of communication, and its own internal law firm. *Cf. Cheney*, 124 S.Ct. at 1395 (vice president being sued in official capacity represented by DOJ). Thus, relation back of a pleading adding a government defendant is permitted so long as notice of the action was initially provided to "the United States Attorney," his or her designee, or "the Attorney General of the United States or an agency or officer who would have been a proper defendant if named," *see* Fed. R. Civ. P. 15(c), a precondition that is satisfied when any other federal official is an original party to the suit. *See* Fed. R. Civ. P. 4(i). Similarly, the Rules provide for automatic substitution of a public officer's successor when he or she leaves office during the pendency of litigation. *See* Fed. R. Civ. P. 25(c).

B. Habeas Procedure Has Tracked And Incorporated Civil Procedure Reforms.

Reforms in habeas procedures have mirrored civil reforms. The impulse to account for modern realities always has been a part of habeas jurisprudence, *see Schlup v. Delo*, 513 U.S. 298, 319 n.35 (1995), and this Court has consistently extolled the value of eschewing formalisms and reaffirmed the importance of ensuring the relevance of the writ in the

modern world. *See, e.g., Lonchar v. Thomas*, 517 U.S. 314, 330 (1996); *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993); *Jones*, 371 U.S. at 243; *Hensley*, 411 U.S. at 350. In addition, the modernization of habeas has become increasingly intertwined with the modernization of civil procedure generally. Congress approved the application of the Federal Rules of Civil Procedure to habeas cases in 1948 by permitting amendment of a petition "as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. This Court has, in turn, made clear that the Federal Rules are generally "applicable . . . to habeas [corpus] cases," *Slack v. McDaniel*, 529 U.S. 473, 489 (2000) (applying Fed. R. Civ. P. 41),[12] unless such application would be "inconsistent with the Habeas Corpus Rules." *Woodford v. Garceau*, 538 U.S. 202, 208 (2003).

Integration of other civil law concepts into habeas litigation has further mainstreamed habeas practice. For example, this Court and Congress have acted in tandem to hone the "abuse of the writ" doctrine, largely incorporating traditional, civil *res judicata* principles. In *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991), this Court placed limits on the filing of "second or successive" habeas petition, reasoning that, just as in the civil arena, a litigant who already has had one full and fair opportunity to seek habeas relief generally should not receive a second. Congress reaffirmed this Court's application of *res judicata* principles to habeas in the Antiterrorism

[12] *See also Calderon v. Ashmus*, 523 U.S. 740, 750 (1998) (Breyer, J., concurring) (describing § 2254 Rule 11 as codification of principle that the Federal Rules apply in habeas); *Collins v. Byrd*, 510 U.S. 1185, 1185 (1994) (Scalia, J., dissenting) (motion to amend habeas petitions should be governed by Federal Rules); *Withrow v. Williams*, 507 U.S. 680, 696 & n.7 (1993) (Fed. R. Civ. P. 15(b) applies in habeas context); *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (Fed. R. Civ. P. 62(c) applies in habeas context); *Browder v. Dir., Dept. of Corr. of Ill.*, 434 U.S. 257, 269-70 (1978) (Fed. Rs. Civ. P. 52(b) & 59 apply in habeas context).

and Effective Death Penalty Act of 1996. *See* 28 U.S.C. § 2244(b); *Felker v. Turpin*, 518 U.S. 651, 664 (1996).

Likewise, as in the civil arena, the Court and Congress have rejected the need for the physical presence of the petitioner in court to commence a habeas proceeding. At Common Law, "production of the body" was "indispensable" to initiate a habeas action. Ferstenfeld-Torres, *supra*, at 461 (citing Rollin C. Hurd, *A Treatise On The Right To Personal Liberty And On The Writ Of Habeas Corpus And The Practice Connected With It*, 239-40 (1876)). As time passed, however, courts moved away from requiring literal production of the petitioner and instead adopted show cause procedures, whereby a petitioner's presence was only required when an issue of fact arose. This practice was endorsed by this Court in *Walker v. Johnson*, 312 U.S. 275, 284 (1941), and then codified in 28 U.S.C. § 2243. An even more flexible provision was included in 28 U.S.C. § 2255 wherein the decision to produce the federal prisoner was left to the discretion of the court. *See Sanders v. United States*, 373 U.S. 1, 20 (1963); *Hayman*, 342 U.S. at 223.

In keeping with these civil reforms, the passage of §§ 2255 and 2241(d) further streamlined habeas procedures by effectively overruling *Ahrens* and authorizing all federal prisoners and some state prisoners seeking collateral relief from their convictions to proceed in their district of conviction. By adopting these venue provisions, Congress "made it clear that" its overriding aim was to promote efficiency and convenience. Note, *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1161 (1969-70).

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It was against this backdrop of modernization that this Court decided *Ex Parte Endo*, *Strait*, and *Braden*—decisions which the government mistakenly tries to characterize as insignificant anomalies, *see* Gov't Br. at 20-21, 25-26. In fact, these cases reflect the procedural changes that were

sweeping civil litigation generally: *Endo*'s refusal to give any importance to the title or location of the nominal government respondent, *see* 323 U.S. at 304-07, mirrored the changes that were occurring in the civil rules concerning suits against government actors in their official capacities; *Strait*'s focus on the jurisdictional concept of "presence," and the Court's express reliance on *International Shoe* for determining whether a court could fairly exercise power over the parties, *see Strait*, 406 U.S. at 345 n.2, was in lockstep with similar concepts in civil cases; and *Braden*'s rejection of *Ahrens'* idiosyncratic construction of "jurisdiction" in § 2241, *see* 410 U.S. at 495-500, allowed habeas courts, like civil courts, to exercise authority, just as the 1867 Congress intended, within the expanded scope their ability to serve process.

III. HABEAS FORUM LITIGATION IN D.C. IS A CASE STUDY IN THE PROFITLESS USE OF "JURISDICTIONAL" RULES.

Habeas forum questions have arisen repeatedly over the past century in the District of Columbia in § 2241 cases for two reasons: 1) there has never been a prison located within the physical boundaries of D.C. for violators of local law, and 2) D.C. is the seat of federal government. Until this Court's decision in *Ahrens*, D.C. courts employed common-sense venue analysis to beneficial effect—D.C. prisoners were able to litigate their § 2241 petitions in D.C. courts, where the bench and bar were best equipped to handle them, while other prisoners with no comparable connection to D.C. were turned away—and, after *Ahrens* was overruled, D.C. courts largely returned to this effective method of assessing choice of forum. But recently the government has tried to breathe new life into the "jurisdictional" residue of *Ahrens* that persists in D.C. case law, and D.C. prisoners are once again in danger of being barred from seeking habeas relief in D.C. courts.

More than 65 years ago, D.C. courts held that habeas law was sufficiently flexible to accommodate D.C. prisoner-petitioners in the D.C. Courts—even under the then-prevailing formalistic rules that governed all habeas cases. In *Sanders v. Allen*, 100 F.2d 717, 719 (D.C. Cir. 1938), the D.C. Circuit held that D.C. prisoners housed in Virginia could bring habeas claims in D.C. courts because their situation was "*sui generis* and . . . in no way analogous to the sentence and confinement of a prisoner convicted of a violation of a United States statute in one of the other Federal District Courts." Seven years later, the D.C. Circuit confirmed a reciprocal choice-of-forum rule with respect to federal prisoners who had no real connection or claim to D.C. In *Sanders v. Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945), the Circuit explained that a rule allowing every federal prisoner in the country to find a forum in D.C. was "without justification either in convenience or logic," and thus rejected, on essentially venue grounds, a federal prisoner-petitioner's attempt to obtain habeas relief in D.C. Continuing to lay out clear and sensible habeas venue principles for local offenders, however, the D.C. Circuit carefully contrasted this holding with the complimentary rule it had established for D.C. prisoner-petitioners, explaining once again that because the habeas forum "rule is a practical one based on common sense administration of justice," it cannot function to bar D.C. courts from resolving cases involving their own prisoners. *Id.* at 20.

Such was the state of the law when this Court decided *Ahrens*, which, just as Justice Rutledge predicted, upended the District's common-sense forum-selection system. 335 U.S. at 207 n.24. Only a few months after *Ahrens* was decided, the D.C. Circuit determined that it had to abandon the venue principles laid out its *Sanders* cases and impose, instead, a rigid rule barring all extraterritorial habeas petitions, even those brought by D.C. prisoners housed at the District's own correctional facility in Virginia. *McAffee v.*

Clemmer, 171 F.2d 131, 131-32 (D.C. Cir. 1948). Subsequently, courts in D.C. struggled with the rule of *Ahrens*. Some applied it faithfully, but appeared unhappy with the outcome. *See e.g., McAffee, supra*; *I. B. v. District of Columbia Dept. of Human Resources, Social Services Administration*, 287 A.2d 827 (D.C. 1972); *Thompson v. District of Columbia*, 158 A.2d 687 (D.C.1960). Others engaged in legal acrobatics seemingly to avoid its inefficient and unfair result. *See, e.g., Bolden v. Clemmer*, 298 F.2d 306 (D.C. Cir. 1961); *Hurley v. Reed*, 288 F.2d 844 (D.C. Cir. 1961); *Robbins v. Reed*, 269 F.2d 242 (D.C. Cir. 1959).

Not surprisingly, then, only a few months after this Court's decision in *Braden*, the D.C. Circuit quickly returned to the sensible choice-of-forum rules that it had applied prior to *Ahrens*. In *Eisel*, 477 F.2d at 1255, the Court, per *Braden*, "employed practical considerations" to re-route habeas claims by petitioners with no real connection to D.C. to the petitioners' home states. *See also Reese v. United States Board of Parole*, 498 F.2d 698, 700 (D.C. Cir. 1974); *Wren v. Carlson*, 506 F.2d 131, 133-34 (D.C. Cir. 1974). Subsequently, in *McCall v. Swain*, 510 F.2d 167, 176-77 (D.C. Cir. 1975), the D.C. Circuit re-introduced common sense venue principles to its analysis of the habeas claims of D.C. prisoners. In light of *Braden*, the Circuit held that "[v]enue considerations rather than an arbitrary jurisdictional obstacle would . . . be employed to serve the policies which underlay the *Ahrens* decision," and would, at the same time, permit D.C. prisoners to regain access to D.C. courts. *Id.*

Unfortunately, the story of D.C. habeas litigation does not end there. Anxious about D.C.'s status as the seat of the federal government and the home to many potential federal respondents, the D.C. Circuit allowed some of *Ahrens*' "jurisdictional" language to creep back into its decisions. Illustrative of the principle that easy cases make bad law, the circumstances in these cases were *Ahrens* redux—the

petitioners had no meaningful connection to D.C. other than the ability to locate some federal respondent there, and their petitions just as easily could have been transferred to another district on venue grounds, *see, e.g., Guerra v. Meese*, 786 F.2d 414 (D.C. Cir. 1986) (federal prisoners convicted in the Eastern District of New York); *Monk v. Secretary of the Navy*, 793 F.2d 364 (D.C. Cir. 1986) (marine court-martialled in California and held in Leavenworth), just as *Braden* demonstrated that *Ahrens* could have been. 410 U.S. at 500.

Since the closure of D.C.'s prison in Virginia and the transfer of D.C. felons to the custody of the BOP (*see* National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. 105-33 § 11000, codified in relevant part at D.C. Code § 24-101), the Circuit's careless use of *Ahrens*-type phraseology has come back to haunt D.C. prisoners. The government has seized upon the pseudo "jurisdictional" language from *Guerra* and *Monk* in an effort to preclude prisoners convicted and sentenced for local D.C. crimes from litigating in D.C. issues that are substantially intertwined with D.C. law and practice.

The battle over this issue was most recently joined in the D.C. Circuit case, *Stokes v. United States Parole Commission*, No. 01-5432 (argued December 8, 2003; decision pending). In 2000, Mr. Stokes was serving a D.C. sentence, imposed in 1986, in the private prison facility in Ohio to which he had been assigned by the BOP. Mr. Stokes filed a *pro se* habeas petition in D.C. challenging, on *ex post facto* grounds, the use of new, materially harsher, D.C. parole guidelines promulgated in 1997. Although the district court deemed the case properly before it, the D.C. Circuit, at the government's urging, dismissed Mr. Stokes' claims for lack of jurisdiction on the ground that the case belonged in Ohio. The Circuit subsequently vacated its order and directed full briefing, after Mr. Stokes obtained counsel. Based on the same "jurisdictional" arguments advanced in this case, the

government maintained that Mr. Stokes' case has no place in D.C. At the same time, the government utterly ignored the venue considerations discussed in *Braden* and applied in D.C., with great efficiency, for decades.

The D.C. Circuit has not yet ruled in *Stokes* case. Mr. Stokes, for his part, has now been moved by the BOP to South Carolina, and the government's latest argument is that Mr. Stokes' case belongs there. Mr. Stokes now waits to hear whether the government will succeed in barring him from invoking the Great Writ in the jurisdiction where he has access to counsel, documents, and witnesses, and where the court and counsel are familiar with the D.C. parole regulations that underlie his claim.

IV. VENUE ANALYSIS, TAILORED TO THE HABEAS CONTEXT, WILL BEST ENSURE SOUND JUDICIAL ADMINISTRATION.

As the government presents the issue, there will be habeas chaos unless this Court resuscitates an *Ahrens*-construction of jurisdiction and formulaic pleading rules long ago abandoned in every other civil context. But there is another, superior alternative to litigating § 2241 choice of forum by proxy—the consideration of venue concerns outright. Thus, the real question is what venue rules should apply to § 2241 petitions.

There will generally be only two potentially appropriate venues for habeas litigation—the place where the petitioner was subject to the legal proceedings at issue; and the place where the petitioner is incarcerated. *Braden's* choice of forum analysis in *Ahrens* provides a neat model for assessing venue in most cases: There should be a rebuttable presumption in favor of the district of incarceration where the petitioner bears the burden of establishing when and how some other proposed location represents a "more convenient forum." *Braden*, 410 U.S. at 500. Some small, but easily identifiable classes of cases, like D.C.-prisoner petitions (and other petitions from federal enclaves like the Virgin Islands,

see, e.g., Callwood v. Enos, 230 F.3d 627, 633 n. 6 (3d Cir. 2000)) will virtually always rebut the presumption, and thus, as a class, will generally require the habeas litigation to take place in the district where legal proceedings took place. In such cases, that will be the location of the most competent bench, bar and evidence. Likewise, it will rarely be efficient for a foreign court to pass judgment on a federal enclave's provincial business.

In other cases, like this one, the presumption will be rebutted by the individual facts presented—here, the inefficiency and injustice of removing an extremely unusual case from the judge and counsel who have already invested, and developed special expertise, in the legal and factual issues. As a result, New York, and not South Carolina, was unquestionably the proper forum to litigate Mr. Padilla's case. By invoking Chief Judge Mukasey's judicial powers to secure Mr. Padilla's presence in New York, the government both signaled that New York was not an inconvenient forum and integrally involved the New York Court in the process leading to Mr. Padilla's capture as an enemy combatant. Indeed, the government's decision to downgrade Mr. Padilla's legal status was apparently triggered by approaching hearings on motions in the District Court for the Southern District of New York filed by Mr. Padilla's counsel, Ms. Newman. *Padilla v. Bush*, 233 F. Supp. 2d 564, 571 (S.D.N.Y. 2002). Moreover, because Chief Judge Mukasey had appointed Ms. Newman to represent Mr. Padilla, and had observed her representation, the New York Court was uniquely situated to evaluate at least one critical issue in the case below—whether Ms. Newman had standing as Mr. Padilla's next friend.

Although it would be difficult to accuse Mr. Padilla of forum-shopping, the government is sure to object to this venue analysis generally on these grounds. Of course, no choice of forum rule can completely foreclose this possibility,

but reliance on venue principles has the advantage of not only identifying the most convenient and efficient forum for resolution of a suit but also minimizing forum-shopping by *both* parties. *See Eisel*, 477 F.2d at 1257 (warning of "inverse forum shopping" by the government); Ferstenfeld-Torres, *supra*, at 467 ("immediate-custodian" pleading rule does not address forum-shopping by the government). *Amicus* makes no claim as to the government's motives here, but it cannot have escaped the government's notice that the jurisdictional and "single-respondent-immediate-physical-custodian" rules it seeks in Mr. Padilla's case will give the government complete control—control enjoyed by no defendant in any other context—over forum-selection in all § 2241 cases. This seems especially unfair in habeas, where there may only be one forum that is convenient for the petitioner and no forum that is inconvenient for the federal government. Moreover, ceding control over choice of forum to the government is antithetical to the "grand purpose" of habeas corpus which is to "protect[] . . . individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones*, 371 U.S. at 243.

CONCLUSION

For the reasons stated above, the lower courts correctly and unanimously determined that this habeas litigation belonged in the Southern District of New York.

Respectfully submitted,

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